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10 Your First Choice, LLC d/b/a
11 First Choice Payday Loan

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**UNITED STATE DISTRICT COURT
DISTRICT OF NEVADA**

11 IRMA RODRIGUEZ,)
12) Civil Action No.: 2:16-cv-02447
13 Plaintiff,)
14)
15 v.)
16)
17 YOUR FIRST CHOICE, LLC D/B/A)
18 FIRST CHOICE PAYDAY LOAN;)
19)
20 Defendants.)
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19 **DEFENDANT YOUR FIRST CHOICE, LLC D/BA FIRST CHOICE**
20 **PAYDAY LOAN'S TRIAL BRIEF**

21 DATE OF TRIAL: April 23, 2018

22 TIME OF TRIAL: 9:00 a.m.

23 COMES NOW Defendant YOUR FIRST CHOICE, LLC D/B/A FIRST
24 CHOICE PAYDAY LOAN, by and through the Law Office of Andrew H.
25 Pastwick, LLC, hereby files this Trial Brief. This Trial Brief is based upon the
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1 pleadings and papers annexed hereto and any such discussions as the Court may
2 entertain at the time of the trial. Defendant reserves the right to file a supplemental
3 trial brief to address any issues that arise during the trial
4

5 DATED this 16th day of April, 2018

6 LAW OFFICE OF ANDREW H. PASTWICK
7 L.L.C.

8 By: /S/ Andrew H. Pastwick
9 Andrew H. Pastwick, Esq.
10 Nevada Bar No. 009146
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14 Attorney for Defendant Your First Choice
15 d/b/a First Choice Payday Loan
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**I
STATEMENT OF FACTS**

This case concerns a defaulted promissory note. On or about March 22, 2016, Plaintiff IRMA RODRIQUEZ (hereinafter “RODRIQUEZ”) borrowed Five Hundred Dollars (\$500.00) from Defendant FIRST CHOICE LOANS (hereinafter “FIRST CHOICE”). To borrow this money from Defendant FIRST CHOICE, Plaintiff RODRIQUEZ was required to read and execute a series of documents including the Consumer Credit Disclosure – Promissory Note.¹

In order to borrow this money from Defendant FIRST CHOICE, Plaintiff RODRIQUEZ was required to read and execute a series of documents including the Consumer Credit Disclosure – Promissory Note and a Verify your Cell Phone Number. Pursuant to these agreements, Plaintiff RODRIQUEZ agreed to the following terms:

I promise to pay the Total of Payments to the order of You, the Lender. I will make the payments at your addresses above. I will make the payments on the dates and in the amounts shown in the Payment Schedule. If an installment payment remains unpaid 10 days or more after the due date, the you may charge Me a late fee of not more than \$15.00, payable on a one-time basis, for any such installment payment. **If I make a late payment or fail to meet my obligations as agreed in this contract, You may report this information to credit bureaus.**²

Credit Reporting. **You agree that we may make inquires**

¹ Consumer Credit Disclosure- Promissory Note, attached as Exhibit “A”.

² Consumer Credit Disclosure- Promissory Note, attached as Exhibit “A”.

1 **concerning your credit history and standing**, and we may report
 2 information concerning your performance under this Agreement to
 3 credit reporting agencies.³

4 ***

5 **Telephone Calls – Monitoring- You agree that if you are past due**
 6 **or in default, you will accept calls from us or a third party we**
 7 **have contracted with regarding the collection of your Account.** If
 8 wireless or cellular telephone numbers are associated with your
 9 Account, **you agree that we may place calls to those numbers**
 10 **which may result in charges from your wireless or cellular**
 11 **carrier.** You understand these calls could be automatically dialed and
 12 a recorded message may be played. You agree to such calls will not
 13 be unsolicited calls for purposes of state or federal law. You also
 14 agree that, from time to time, we may monitor telephone
 15 conversations between you and us to assure the quality of our
 16 customer service.

17 **Email and SMS/Text Messaging. You consent that we or in the**
 18 **event that your account is turned over to a third party for**
 19 **collections our agents may contact you via email to any email**
 20 **address associated with your account.** In addition, you consent that
 21 we may transmit SMS/text messages to any wireless telephone
 22 number associated with your account which may result in charges
 23 from your wireless carrier. Those charges will be reimbursed upon
 24 request and presentment of receipt(s) or bill(s). If you wish to opt-out
 25 from either email or SMS/text messages, please contact us at 702-873-
 26 4778. (emphases added)⁴

27 In addition, Plaintiff RODRIGUEZ twice completed “Verify your Cell
 28 Phone Number!” form that states:

29 I, Irma Rodriguez, Understand that First Choice Loans Would like to
 30 verify my cell phone number through text during this process.
 31 You understand that any text we send may be accessed to anyone that
 32 has access to your texts.

3 ³ Consumer Credit Disclosure- Promissory Note, attached as Exhibit “A”.

4 ⁴ Consumer Credit Disclosure- Promissory Note, attached as Exhibit “A”.

1 You understand that the mobile phone provider may charge you fees
2 for text messages that we send you, you agree that we have no liability
3 for the cost of such text.⁵

4 I 702 689-0596, Understand that First Choice Loans Would like to
5 verify my cell phone number through text during this process.
6 You understand that any text we send may be accessed to anyone that
7 has access to your texts.

8 You understand that the mobile phone provider may charge you fees
9 for text messages that we send you, you agree that we have no liability
10 for the cost of such text.⁶

11 Subsequently after receiving the money from Defendant, Plaintiff breached
12 the agreement and failed to repay the money to Defendant.⁷ After Plaintiff
13 breached the agreement, Defendant contacted Plaintiff by calling Plaintiff on the
14 phone number that Plaintiff provided to Defendant.⁸ Defendant did not use an
15 automatic dialer or use a program dialer to contact Plaintiff. Furthermore,
16 Defendant did not contact or attempt to contact Plaintiff more than twice in any
17 day and did not attempt to contact Plaintiff before the 8 am or after 9 pm.⁹

18 In an attempt to verify where Plaintiff lived after she breached the
19 agreement, Defendant went to Plaintiff's listed residence that she provided on the
20 Consumer Credit Disclosure- Promissory Note. On October 6, 2016, Defendant
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23
24 5 Verify your Cell Phone Number! Dated November 17, 2015, attached as Exhibit "B" and Verify your Cell
25 Phone Number! Dated March 22, 2016, attached as Exhibit "C".

26 6 Verify your Cell Phone Number! Dated November 17, 2015, attached as Exhibit "B" and Verify your Cell
27 Phone Number! Dated March 22, 2016, attached as Exhibit "C".

28 7 Pretrial Order Stipulated Facts Paragraph 8.

8 Telephone call log, attached as Exhibit "D".

9 Telephone call log, attached as Exhibit "D".

1 contacted Plaintiff at her residence and provided her with a note to contact
 2 Defendant FIRST CHOICE. On October 12, 2016, Defendant left a note on
 3 Plaintiff's house and did not have any contact with Plaintiff.¹⁰ It is important for
 4 the Court to note that Plaintiff RODRIQUEZ's primary language is Spanish and
 5 the individual who contacted Plaintiff does not speak Spanish and there is no
 6 evidence that a conversation occurred in either language.¹¹ The note states:

9 We came by today to contact you. Please call me at (702) 873-4778
 10 or come in as soon as possible.
 11 1680 E. Flamingo Rd.
 Las Vegas, Nevada 89119¹²

12 Both visits to the residency occurred before 8:00 p.m.¹³

13 In an attempt to avoid paying Defendant pursuant to Promissory Note,
 14 Plaintiff filed the underlying Complaint against Defendant alleging that Defendant
 15 violated the Fair Debt Collection Practices Act (hereinafter referred to as
 16 "FDCPA"), Telephone Consumer Protection Act of 1991 and the Fair Credit
 17 Reporting Act. Subsequently, Plaintiff agreed to dismiss her allegations that
 18 Defendant violated the Telephone Consumer Protection Action of 1991. As
 19 argued below, Defendant respectfully requests that this Court finds in favor of
 20 Defendant on all of Plaintiff's claims.

26 10 First Choice Loans, note dated 10/12/2016, attached as Exhibit "E"
 27 11 Pretrial Order Stipulated Facts Paragraphs and 12 and 13.
 12 First Choice Loans, note dated 10/12/2016, attached as Exhibit "E"
 13 Telephone call log, attached as Exhibit "D".

**II.
ARGUMENT**

A. PLAINTIFF HAS FAILED TO PROVIDE ANY EVIDENCE THAT DEFENDANT BREACHED EITHER THE FDCPA OR NRS 604A.415.

Defendant FIRST CHOICE did not engage in any activity that violated the FDCPA or NRS 604A.415. NRS 604A.415 states in part:

NRS 604A.415 Collection of defaulted loan; civil action to collect debt; venue.

1. If a customer defaults on a loan, the licensee may collect the debt owed to the licensee only in a professional, fair and lawful manner. When collecting such a debt, the licensee must act in accordance with and must not violate sections 803 to 812, inclusive, of the federal Fair Debt Collection Practices Act, as amended, 15 U.S.C. §§ 1692a to 1692j, inclusive, even if the licensee is not otherwise subject to the provisions of that Act.

At trial it is expected that Plaintiff will allege that Defendant FIRST CHOICE engaged in activities that violated 15 U.S.C. § 1692(d), but a close reading of this statute reveals that Defendant has not violated it. More specifically 15 U.S.C. § 1692(d) states:

15 U.S.C. § 1692d - Harassment or abuse

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1)

The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

(2)

The use of obscene or profane language or language the natural

consequence of which is to abuse the hearer or reader.

(3)

The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 1681a(f) or 1681b(3) [1] of this title.

(4)

The advertisement for sale of any debt to coerce payment of the debt.

(5)

Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(6)

Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

1. Defendant did not use or threaten violence or other criminal means to harm the physical person, reputation or property of Plaintiff.

There has been no allegation that Defendant used or threatened violence against Plaintiff. As the parties have stipulated, Plaintiff's primary language is Spanish and the individual who visited her house on two separate occasions on behalf of FIRST CHOICE speaks only English.¹⁴ Defendant FIRST CHOICE did not have any conversations with Plaintiff in either language. The purpose of these visits was to verify where Plaintiff lived and give Plaintiff a note advising Plaintiff to contact FIRST CHOICE. While Plaintiff may wish that the Court would interpret the note differently, the note simply states:

We came by today to contact you. Please call me at (702) 873-4778 or come in as soon as possible.
1680 E. Flamingo Rd.

¹⁴ Stipulation 12 and 13 of the Pretrial Order

1 Las Vegas, Nevada 89119¹⁵

2 More importantly, the Note does not contain any threats. Out of the two visits to
3 Plaintiff's property to verify residency, Defendant only made contact with Plaintiff
4 one time. The second time that Defendant went to verify Plaintiff's residency,
5 Plaintiff was not home and Defendant left a note on the door.¹⁶

7 While it is evident that Plaintiff has a vivid imagination, what is not evident
8 is what specific behavior did Defendant engage in that violated 15 U.S.C. § 1692d.
9 FIRST CHOICE respectfully requests that this Court finds in favor of FIRST
10 CHOICE on Plaintiff's first claim.

12
13 **2. Defendant did not harass Plaintiff.**

14 Defendant did not harass Plaintiff. Although the term "harass" is not defined
15 in the FDCPA, the Act's legislative history sheds light on what abusive practices
16 violate § 1692d:

18 [O]bscene or profane language, threats of violence, telephone calls at
19 unreasonable hours, misrepresentation of a consumer's legal rights,
20 disclosing a consumer's personal affairs to friends, neighbors, or an
21 employer, obtaining information about a consumer through false
22 pretense, impersonating public officials and attorneys, and simulating
legal process.

23 Okyere v. Palisades Collection, LLC, 961 F.Supp.2d 508, 514 (S.D.N.Y., 2013)

24 There has been no allegation that Defendant used obscene or profane
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27 ¹⁵ First Choice Loans, note dated 10/12/2016, attached as Exhibit "E"

28 ¹⁶ Telephone call log, attached as Exhibit "D".

1 language against Plaintiff. Defendant only contacted Plaintiff between the hours of
 2 8 a.m. and 9 p.m. and did not disclose RODRIGUEZ's personal affairs to her
 3 friends, neighbors or her employer. As the parties have stipulated, Plaintiff's
 4 primary language is Spanish and the individual who visited her house on two
 5 separate occasions on behalf of FIRST CHOICE speaks only English.¹⁷

7 Plaintiff RODRIGUEZ has failed to produce any evidence that Defendant
 8 FIRST CHOICE engaged in harassing behavior against her. FIRST CHOICE
 9 respectfully requests that this Court finds in favor of FIRST CHOICE.
 10

11 **3. Defendant did not cause Plaintiff's telephone number to ring or**
 12 **engage in in any person in telephone conversation repeatedly or**
 13 **continuously.**

14 Subsequently after Defendant filed her Motion to Dismiss, Plaintiff
 15 acknowledged that she did not have any basis for her allegations that Defendant
 16 violated the Telephone Consumer Protection Act of 1991 and agreed to dismiss
 17 these allegations.¹⁸ Even if this Court were to give Plaintiff a second bite at the
 18 apple and allow Plaintiff to argue that Defendant called her repeatedly, there is no
 19 evidence to support this claim. Despite being requested during discovery, Plaintiff
 20 has refused and failed to produce any documents to support her claim that
 21 Defendant contacted Plaintiff repeatedly. More specifically:
 22
 23

24 Request No. 6: Please provide copies of any and all documents
 25

26
 17 Stipulation 12 and 13 of the Pretrial Order

18 ORDER Granting STIPULATION of Dismissal as to Counts II and III, on file with Court (Doc 27).

1 that support your allegation contained in Paragraph 30 that “FIRST
2 CHOICE called the Plaintiffs cell phone from several unidentified or
3 unknown numbers”:

4 Response to Request No. 6: Plaintiff objects to this Request as overly
5 broad and unduly burdensome. Plaintiff further objects that this
6 request is vague and ambiguous. Plaintiff also objects to this Request
7 as it seeks information in the custody, control and/or possession of the
8 Defendant.

9 Subject to the General Objections, and without waiver of any
10 objection, Plaintiff responds as follows: See Complaint, Initial
11 Disclosures, and First Supplement to Initial Disclosures. Discovery is
12 ongoing and we will supplement these responses should additional
13 information become available.¹⁹

14 Plaintiff has failed to produce any evidence to support her claim that
15 Defendant FIRST CHOICE contacted her using unidentified or unknown numbers.
16 More specifically, Plaintiff has failed to produce any phone records that would
17 support her claim. Discovery has been closed for several months and Plaintiff has
18 produced absolutely nothing to support her claim. FIRST CHOICE respectfully
19 requests that this Court finds in favor of FIRST CHOICE on Plaintiff’s first claim.

20 **4. Defendant did not engage in the placement of telephone calls without**
21 **meaningful disclosure of the caller’s identity.**

22 Subsequently after Defendant filed its Motion to Dismiss, Plaintiff
23 acknowledged that she did not have any evidence to support her allegations that
24 Defendant violated the Telephone Consumer Protection Act of 1991 and dismissed
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27 ¹⁹ Plaintiff’s Responses to Defendant’s First Set of Requests for Production of Documents, attached as
28 Exhibit “F”

1 these allegations.²⁰ Based on this stipulation, the remaining allegations in
 2 Plaintiff's complaint involve whether Defendant's two visits to Plaintiff's
 3 residency violated Nevada debt collection law and whether Defendant violated the
 4 Fair Credit Reporting Act by obtaining Plaintiff's credit report. As such, none of
 5 the existing allegations involve the placement of telephone calls without the
 6 meaningful disclosure of the caller's identify, therefore this section does not apply.

7
 8
 9 **B. PLAINTIFF NEVER ADVISED DEFENDANT IN WRITING TO
 10 STOP COMMUNICATING WITH HER REGARDING THE DEBT.**

11 Plaintiff RODRIGUEZ has alleged that she notified Defendant not to contact
 12 her anymore regarding the debt; however, Plaintiff has failed to provide any
 13 evidence that she notified Defendant in writing to stop contacting her. Pursuant to
 14 15 U.S.C. § 1692c, if a consumer no longer wishes to be contacted by a debt
 15 collector, the consumer must notify the debt collector in writing to cease all
 16 communication. More specifically 15 U.S.C. § 1692c states:

17
 18
 19 15 U.S. Code § 1692c - Communication in connection with debt
 20 collection

21 (c) Ceasing communication. If a consumer notifies a debt collector in
 22 **writing** that the consumer refuses to pay a debt or that the consumer
 23 wishes the debt collector to cease further communication with the
 24 consumer, the debt collector shall not communicate further with the
 25 consumer with respect to such debt, except—

26 (1) to advise the consumer that the debt collector's further efforts are
 27 being terminated;

28 (2) to notify the consumer that the debt collector or creditor may

20 ORDER Granting STIPULATION of Dismissal as to Counts II and III, on file with Court (Doc 27).

1 invoke specified remedies which are ordinarily invoked by such debt
2 collector or creditor; or

3 (3) where applicable, to notify the consumer that the debt collector or
4 creditor intends to invoke a specified remedy.

5 If such notice from the consumer is made by mail, notification shall
6 be complete upon receipt. (emphases added)

7 A debtor consents to calls about “an existing debt” when he gives his
8 number “in connection with” that debt, 23 F.C.C. Rcd. at 564—including after his
9 initial signing of the loan. Hill v. Homeward Residential, Inc., 799 F.3d 544 (6th
10 Cir., 2015). While debtors may “[t]ypically” give their cellphone number “as part
11 of a credit application” at the beginning of the debtor—creditor relationship, see 23
12 F.C.C. Rcd. at 565 n. 36, it doesn't have to be that way. Mais v. Gulf Coast
13 Collection Bureau, Inc., 768 F.3d 1110, 1122 (11th Cir. 2014); *see, e.g., Sartori v.*
14 *Susan C. Little & Associates, P.A.*, 571 Fed.Appx. 677, 683 (10th Cir.2014)
15 (holding that the debtor gave his prior express consent, even though he didn't give
16 his number until one year after debt was incurred).

17 The Court has held that a verbal request to cease debt collection calls to a
18 cellular phone will not be sufficient to revoke "prior express consent" under the
19 FDCPA. Moltz v. Firstsource Advantage, Inc., Case No. 08-CV-239S, 2011 WL
20 3360010, *5 (W.D.N.Y. Aug. 3, 2011) (because Congress has stated that debt
21 collection efforts are governed by the FDCPA, **when calls to a cell phone are**
22 **made for debt collection purposes, the FDCPA's requirement that a request to**
23 **stop the calls be made in writing applies**) (emphases added); Starkey v.

1 Firstsource Advantage, LLC, Case No. 07-CV-662A, 2010 WL 2541756, *6
2 (W.D.N.Y. Mar. 11, 2010) (same), *see also* Cunningham v. Credit Mgmt., L.P.,
3 2010 WL 3791104, *5 (N.D. Tex. Aug. 30, 2010).

4
5 In this dispute, 15 U.S. Code § 1692c is very clear, RODRIGUEZ was
6 required to contact FIRST CHOICE in writing to advise FIRST CHOICE not to
7 communicate with her anymore. RODRIGUEZ has not produced any
8 documentation showing that she contacted FIRST CHOICE in writing and notified
9 FIRST CHOICE not to contact her. As such, RODRIGUEZ has failed to
10 demonstrate that she notified FIRST CHOICE in writing to stop contacting her.
11
12 FIRST CHOICE respectfully requests that this Court finds in favor of FIRST
13 CHOICE on Plaintiff's claim that Defendant violated Plaintiff's rights under
14 FDCPA.
15

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17 **C. DEFENDANT DID NOT ENGAGE IN HARASSING BEHAVIOR**
18 **WHEN IT CONTACTED PLAINTIFF.**

19 Defendant can contact Plaintiff regarding an outstanding debt several times a
20 day and not be engaged in harassing behavior. In reviewing this issue, Courts have
21 gone as far as asserting that even daily phone calls, without other abusive conduct
22 are insufficient to raise a triable issue of fact for the jury. *See* Saltzman v. I.C. Sys.,
23 Inc., No. 09–10096, 2009 WL 3190359, at *7 (E.D.Mich. Sept. 30, 2009) (“[A]
24 debt collector does not necessarily engage in harassment by placing one or two
25 unanswered calls a day in an unsuccessful effort to reach the debtor, if this effort is
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unaccompanied by any oppressive conduct such as threatening messages.”);
Arteaga v. Asset Acceptance, LLC, 733 F.Supp.2d 1218, 1229 (E.D.Cal.2010)
(finding that “daily” or “nearly daily” phone calls alone fail to raise an issue of fact
for a jury to determine whether the conduct violates § 1692d and § 1692(d)(5));
Tucker v. CBE Grp., Inc., 710 F.Supp.2d 1301, 1305 (M.D.Fla.2010) (noting that
despite 57 calls over a 20–day period being “somewhat high,” the conduct still did
not violate § 1692(d)(5) as a matter of law where defendant left six messages,
made no more than seven calls in a single day, and did not call back the same day
after leaving a message); Durthaler v. Accounts Receivable Mgmt., Inc., 854
F.Supp.2d 485 (S.D.Ohio 2012) (finding no FDCPA violation even though debt
collector made 30 calls to debtor's phone numbers, one of which was made after
the debt collector was informed that the number did not belong to the debtor, and
two calls to debtor's roommate in 73 day period); Katz v. Capital One, No. 1:09–
cv–1059, 2010 WL 1039850 (E.D.Va. March 18, 2010) (15–17 calls, not more
than two in a day and not at inconvenient times, after debtor notified debt collector
of attorney representation did not violate the FDCPA).

An intrusion, whether by virtue of persistence or character, "must rise to the
level of what a reasonable person would find 'highly offensive.'" Imagine Medispa,
999 F. Supp. 2d at 886 (quoting Restatement (Second) of Torts § 652B cmt. d
(1977))("It is only when the telephone calls are repeated with such persistence and

1 frequency as to amount to a course of hounding the plaintiff, that becomes a
2 substantial burden to his existence, that his privacy is invaded.").

3 In this dispute, Plaintiff has failed to produce any evidence to show that
4 Defendant has contacted her beyond what has previously been held as reasonable.
5 Defendant contacted Plaintiff only occasionally and did not repeatedly call
6 Plaintiff every day or leave any type of threatening or intimidating messages.
7 Defendant FIRST CHOICE respectfully requests that this Court finds in favor of
8 Defendant on Plaintiff's first cause of action.
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11 **D. DEFENDANT FIRST CHOICE DID NOT MAKE FALSE,**
12 **DECEPTIVE OR MISLEADING STATEMENTS TO PLAINTIFF**
13 **RODRIGUEZ.**

14 Defendant did not make any false, deceptive or misleading statement to
15 Plaintiff RODRIGUEZ. The FDCPA prohibits debt collectors from using "any
16 false, deceptive, or misleading representation or means in connection with the
17 collection of any debt." 15 U.S.C. § 1692e. Specifically, 15 U.S.C. § 1692e(2)
18 prohibits "[t]he false representation of ... the character, amount, or legal status of
19 any debt." "In evaluating the tendency of language to deceive, the Court should
20 look not to the most sophisticated readers but to the least." Baker v. G. C. Servs.
21 Corp., 677 F.2d 775, 778 (9th Cir. 1982). The FDCPA does not ask the subjective
22 question of whether an individual plaintiff was actually misled by a
23 communication; rather, it asks the objective question of whether the hypothetical
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1 least sophisticated debtor would likely have been misled. Afewerki v. Anaya Law
2 Grp., 868 F.3d 771 (9th Cir., 2017) "If the least sophisticated debtor would likely
3 be misled by a communication from a debt collector, the debt collector has violated
4 the Act." Guerrero v. RJM Acquisitions LLC, 499 F.3d 926, 934 (9th Cir. 2007)
5 The Court has recognized that "the least sophisticated debtor may be uninformed,
6 naive, and gullible." Tourgeman v. Collins Fin. Servs., Inc., 755 F.3d 1109, 1119
7 (9th Cir. 2014). To be sure, "her interpretation of a collection notice cannot be
8 bizarre or unreasonable," but it is still the perspective of the least sophisticated
9 debtor that counts. Afewerki, 868 F.3d at 775 *quoting* Tourgeman, 755 F.3d at
10 1119.
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14 In Donohue v. Quick Collect, Inc. (cited *infra*), the 9th Circuit adopted the
15 materiality requirement as a "corollary" to the least sophisticated debtor standard.
16 Donohue v. Quick Collect, Inc., 592 F.3d 1027, 1033 (9th Cir. 2010). The Court
17 held "that false but non-material representations are not likely to mislead the least
18 sophisticated consumer and therefore are not actionable under §1692e." Id. at
19 1033. Material false representations, are those that could "cause the least
20 sophisticated debtor to suffer a disadvantage in charting a course of action in
21 response to the collection effort." Davis v. Hollins Law, 832 F.3d 962, 966 (9th
22 Cir. 2016). Immaterial false representations, by contrast, are those that are
23 "literally false, but meaningful only to the 'hypertechnical' reader." Id.
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1 Plaintiff has not produced any evidence that Defendant FIRST CHOICE
2 made any material misrepresentations to her. Plaintiff acknowledges that she
3 borrowed money from Defendant FIRST CHOICE and that she failed to repay it.
4 Furthermore, Plaintiff has not disputed the amount that Defendant FIRST CHOICE
5 claims is owed on the account. Plaintiff has failed to produce any evidence that
6 Defendant FIRST CHOICE made any material misrepresentations to Plaintiff.
7 Under the standard adopted in Donohue, Plaintiff is unable to demonstrate that
8 Defendant made any material misrepresentations to her. Defendant respectfully
9 requests that this Court find in favor of Defendant on Plaintiff's first claim.
10
11

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13 **E. DEFENDANT HAD A PERMISSIBLE USE AND DID NOT VIOLATE**
14 **THE FAIR CREDIT REPORTING ACT**

15 Defendant FIRST CHOICE had a permissible purpose for pulling Plaintiff's
16 credit report. Under the purview of the FAIR CREDIT REPORTING ACT
17 (hereinafter "FCRA"), "collection of an account of the consumer is a "permissible
18 purpose" for requesting a consumer report. 15 U.S.C. § 1681b(a)(3)(A).
19

20 To prove a violation of section 1681b, a plaintiff must show that credit
21 information was obtained for an impermissible purpose. A showing of a
22 permissible purpose is a complete defense. Stonehart v. Rosenthal, 2001 WL
23 910771, *3 (S.D.N.Y. August 13, 2001)(*citing*, Advanced Conservation Sys. Inc.
24 v. Long Island Lighting Co., 934 F.Supp. 53, 54 (E.D.N.Y. 1996)); Korotki v.
25 Attorney Servs. Corp. Inc., 931 F.Supp. 1269, 1275 (D.Md. 1996), *aff'd*, 131 F.2d
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1 135 (4th Cir. 1997)) The fact that a consumer report is furnished for an
2 impermissible purpose does not result in automatic liability. Dobson v. Holloway,
3 828 F.Supp. 975, 977 (M.D. Ga 1993).

4
5 A debt collector is permitted to obtain a consumer report if it does so for the
6 purposes of collecting a debt. *See* 15 U.S.C. § 1681b(a)(3)(A); Morgovsky v.
7 Creditor's Collection Service of San Francisco, 92 F.3d 1193 (9th Cir 1996).

8
9 "[O]ne of the 'permissible purposes' for obtaining a consumer report under 15
10 U.S.C. § 1681b(a)(3)(A) would permit a collection agency retained by a creditor to
11 collect on an account of the consumer." Hinkle v. CBE Grp., No. CV 311-091,
12 2012 WL 681468, at *3 (S.D.Ga. Feb. 3, 2012). Therefore, if a creditor retains a
13 debt collector to collect a debt owed by a consumer, that debt collector has a
14 permissible purpose for obtaining that consumer's consumer report, whether or not
15 Plaintiff personally did business with this specific Defendant. *See* Hinkle, 2012
16 WL 681468, at *3.

17
18 As long as the debt collector has "reason to believe" the consumer owes the
19 debt, the debt collector may permissibly obtain the consumer's credit report
20 without violating the FCRA. Korotki v. Attorney Services Corp. Inc., 931 F.Supp.
21 1269, 1276 (D. Md., 1996). (holding that the "reason to believe" standard applies
22 in evaluating whether a user had a permissible purpose). To prove a violation of
23 the FCRA, plaintiff must show that defendants had an impermissible purpose in
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1 obtaining the credit report or, in other words, that they lacked a permissible
2 purpose. Id. The FCRA does not limit authorized users' access to credit
3 information, as long as the user has a permissible purpose may obtain a consumer
4 report. Id., *see also* Hasbun v. County of Los Angeles, 323 F.3d 801 (9th Cir.,
5 2003) (holding that the case law addressing this issue has uniformly held that
6 creditors have a permissible purpose in receiving a consumer report to assist them
7 in collecting a debt.)
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10 In Korotki, the debt collector obtained the consumer's credit report to obtain
11 the consumer's current address. Korotki v. Attorney Services Corp. Inc., 931
12 F.Supp. 1269, 1276 (D. Md., 1996). The consumer then brought an action against
13 the debt collector alleging that the debt collector did not have permissible use to
14 obtain the consumer's credit report because there were other avenues available to
15 the debt collector to obtain the address and the debt collector did not have to obtain
16 the credit report. Id. In finding that debt collector did not violate the FCRA, the
17 Court held that even assuming the Debt Collector could have obtained the
18 information it needed from a less comprehensive summary, the FCRA does not
19 limit authorized users' access to credit information. Id. A user who has a
20 permissible purpose may obtain a consumer report. Id. This is clear in light of the
21 language of § 1681b that a report may be issued for the 'review or collection of an
22 account.' Id., *see also* Shah v. Collecto, Inc., No. CIV 2004-4059, 2005 WL
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2216242, at *12 (D.Md. Sept. 12, 2005) (“[I]f a user had a reason to believe that a consumer owed a debt, it would have a permissible purpose to access the consumer's credit report.”).

The Court has extended the permissible use category to even include debt collectors who are considering whether to obtain the debt account. In Baker v. Bronx-Westchester Investigations, Inc., (cited *infra*) the Court stated:

For purposes of 15 U.S.C. § 1681b, we find no material distinction between the hiring of an investigator to actually collect a judgment, and the hiring of an investigator to locate the debtor so that judgment may thereafter be collected.

Baker v. Bronx-Westchester Investigations, Inc., 850 F.Supp. 260, 264 fn. 5 (S.D.N.Y., 1994)

Defendant **WAS** and **IS STILL** in the process of collecting on the Promissory Note that Plaintiff signed. (emphases added) Plaintiff's filing of an FDCPA violation complaint against Defendant does not stop, prohibit or prevent Defendant FIRST CHOICE from pursuing Plaintiff RODRIGUEZ for the outstanding promissory note. As the Court stated in Robles v. Ally Bank, (cited *infra*) these two claims are separate and distinct from each other. Robles v. Ally Bank, 2013 U.S. Dist. LEXIS 417, 4 (S.D. Cal. Jan. 2, 2013). More specifically the court states in Robles:

While the debt claim and the FDCPA counterclaim raised here may, in a technical sense, arise from the same loan transaction, the two claims bear no logical relation to one another ... the suit on the

1 debt brought in state court is not logically related to the federal action
2 initiated to enforce federal policy regulating the practices for the
collection of such debts.

3 Id.; *citing* Peterson v. United Accounts, Inc. 638 F.2d 1134, 1136-1137 (8th Cir.
4 N.D. 1981).

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6 In this dispute, Defendant FIRST CHOICE had a permissible purpose for
7 obtaining a copy of Plaintiff's credit report. Defendant FIRST CHOICE obtained
8 the credit report for purposes of collecting on the debt. Defendant is still actively
9 entitled to collect on the Promissory note and therefore is entitled to pull Plaintiff's
10 credit report to assist Defendant's collection efforts. Defendant FIRST CHOICE
11 respectfully requests that this Court finds in favor of Defendant on Plaintiff's
12 second claim.
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**III.
CONCLUSION**

Based on the foregoing arguments, Defendant respectfully requests that this Court finds in favor of Defendant on all of Plaintiff's claims.

DATED this 16th day of April, 2018

LAW OFFICE OF ANDREW H. PASTWICK L.L.C.

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Your First Choice, LLC dba First Choice Payday Loan

CERTIFICATE OF SERVICE

Pursuant to F.R.C.P. 5(b), I certify that I am an employee of the Law Office of Andrew H. Pastwick, and not a party to, nor interest in, the within action, that on April 16th, 2018, a true and correct copy of the foregoing DEFENDANT YOUR FIRST CHOICE, LLC D/BA FIRST CHOICE PAYDAY LOAN'S TRIAL BRIEF was served via pacer to:

David H. Krieger, Esq.
Haines & Krieger, LLC
8985 S. Eastern Avenue, Suite 350
Henderson, Nevada 89123

Matthew I. Kneppper
Knepper & Clark, LLC
10040 W. Cheyenne Ave, Suite 170-109
Las Vegas, Nevada 89129

/S/ Andrew H. Pastwick

An Employee of Law Office of Andrew H. Pastwick L.L.C.

Exhibit Index

<u>Document</u>	<u>Exhibit</u>
Consumer Credit Disclosure- Promissory Note	Exhibit "A"
Verify your Cell Phone Number! Dated November 17, 2015	Exhibit "B"
Verify your Cell Phone Number! Dated March 22, 2016	Exhibit "C"
Telephone call log	Exhibit "D"
First Choice Loans, note dated 10/12/2016	Exhibit "E"
Plaintiff's Responses to Defendant's First Set of Requests for Production of Documents	Exhibit "F"